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and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Court of Appeals for the Federal Circuit

CHRYSLER MOTORS CORP., PLAINTIFF-APPELLANT *v.*
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 91–1190

(Decided October 8, 1991)

Joseph S. Kaplan, Ross & Hardies, of New York, New York, argued for plaintiff-appellant. With him on the brief was *Michelle F. Forte*, of counsel.

Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *Stuart M. Gerson*, Assistant Attorney General and *David M. Cohen*, Director. Also on the brief was *Edward N. Maurer*, U.S. Customs Service, of counsel.

Barton C. Green, Senior Vice President, General Counsel, Secretary & Treasurer, American Iron and Steel Institute, of Washington, D.C., represented the Amicus Curiae, American Iron and Steel Institute. *Alexander W. Sierck*, Beveridge & Diamond, P.C., of Washington, D.C., represented Amicus Curiae, Automotive Parts and Accessories Association and American Iron and Steel Institute.

Appealed from: U.S. Court of International Trade.
Judge CARMAN.

Before NIES, *Chief Judge*, NEWMAN and RADER, *Circuit Judges*.

NEWMAN, *Circuit Judge*.

Chrysler Motors Corporation appeals the decision of the Court of International Trade[1] denying drawback for duty paid on certain merchandise transferred by Chrysler to a foreign-trade zone, the court holding that the merchandise is not considered exported on the facts that pertain. On the opinion of the Court of International Trade, which we adopt, the decision is

AFFIRMED.

[1] *Chrysler Motors Corporation v. United States*, 755 F. Supp. 388 (Ct. Int'l Trade 1990).

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Judges

Gregory W. Carman*
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

Morgan Ford

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

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* Acting as Chief Judge, effective May 1, 1991, pursuant to 28 U.S.C. § 253d.

Decisions of the United States Court of International Trade

(Slip Op. 91–90)

FLORAL TRADE COUNCIL OF DAVIS, CALIFORNIA, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND ASOCIACION COLOMBIANA DE EXPORTADORES DE FLORES, ET AL., DEFENDANTS-INTERVENORS

Consolidated Court No. 90–06–00290

[Remanded.]

(Decided September 27, 1991)

Stewart & Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.* and *Jimmie V. Reyna*), for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Jeanne E. Davidson*); *Andrea Fekkes Dynes*, Office of Chief Counsel for International Trade Administration, United States Department of Commerce, of counsel, for defendant.

Arnold & Porter (*Lawrence A. Schneider, Michael T. Shor*, and *Susan G. Lee*); *Akin, Gump, Strauss, Hauer & Feld* (*Patrick F. J. Macrory, Spencer S. Griffith*), for defendant-intervenors.

OPINION

RESTANI, *Judge*: In this case, domestic and foreign producers of fresh cut flowers challenge the final results of the second antidumping duty review by the International Trade Administration ("ITA") in *Certain Fresh Cut Flowers From Colombia*, 55 Fed. Reg. 20491 (1990).[1] The review covered 218 producers and exporters of flowers (standard carnations, miniature (spray) carnations, standard chrysanthemums, and pompon chrysanthemums) from Colombia to the United States, and the period march 1, 1988 through February 28, 1989.

The case is before the court on motions for judgment upon the agency record brought by plaintiff, Floral Trade Council of Davis, California ("FTC"), and the intervenors, Asociacion Colombiana de Exportadores de Flores, its individual members, and 201 individual growers and exporters ("Asocolflores"). The government seeks a remand to correct four specific errors.

The court will address plaintiff's claims first, then turn to claims raised by the intervenors and the government.

STANDARD OF REVIEW

ITA's decision will be upheld unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19

[1] Under United States antidumping law, the International Trade Administration issues antidumping duty orders on imported merchandise that is sold, or likely to be sold, in the United States at less than fair value. Merchandise is sold at less than fair value when, in general terms, the United States price is lower than the price at which merchandise is sold in the home market.

U.S.C. § 1516a(b)(1)(B) (1988).[2] In addition, ITA's interpretation of the statute it administers must be reasonable and must not conflict with Congressional intent. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45, 104 S. Ct. 2778, 2781–83 (1984); *Four "H" Corp. v. United States*, 9 CIT 271, 272, 611 F. Supp. 981, 983 (1985).

DISCUSSION

I. FTC CHALLENGES

A. *Constructed Value as Basis for Foreign Market Value:*

FTC argues that ITA erred in using constructed value ("CV") as the basis for foreign market value ("FMV") because the statute, regulations and agency practice express a preference for third country prices. According to FTC, adequate third country price information was available, and ITA's decision to reject it was unsupported by the record.

1. *Statutory Scheme:*

In the preliminary determination, ITA used home market or third country prices as the basis of FMV, and CV when home market or third country prices were not available. *Certain Fresh Cut Flowers from Colombia Preliminary Results of Antidumping Duty Administrative Review*, 55 Fed. Reg. 456, 457 (1990). In the final determination, ITA rejected home market and third country sales in favor of CV. ITA's decision was based on findings that home market sales were inadequate, and due to an "unusual set of facts" third country prices would not provide an accurate measure of dumping. 55 Fed. Reg. at 20492–493.

Section 773 of the Tariff Act of 1930, as amended, sets forth three methods for determining FMV: home market sales; third country sales; and constructed value. *See* 19 U.S.C. § 1677b(a)(1)–(2).[3] The statute provides that if home market sales are inadequate, FMV may be determined based on CV, notwithstanding third country sales. 19 U.S.C.

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[2] Unless otherwise stated, citations to the United States Code are to the 1988 edition, and citations to the Code of Federal Regulations are to the 1991 volume.

[3] The statute provides, in part:

(1) In general.

The foreign market value of imported merchandise shall be the price * * *.

(A) at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual commercial quantities and in the ordinary course of trade for home consumption, or

(B) if not so sold or offered for sale for home consumption, or if the administering authority determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States * * *.

(2) Use of constructed value.

If the administering authority determines that the foreign market value of imported merchandise cannot be determined under paragraph (1)(A), then, *notwithstanding paragraph (1)(B), the foreign market value of the merchandise may be the constructed value of that merchandise* * * *

19 U.S.C. § 1677b(a)(1)–(2) (emphasis added).

Constructed value is defined, in part, as:

the sum of – (A) the cost of materials * * * and of fabrication or other processing of any kind employed in producing such or similar merchandise * * * (B) an amount for general expenses and profit * * * and (C) the cost of all containers and coverings * * *, and all other expenses incidental to placing the merchandise under consideration in condition packed ready for shipment to the United States.

19 U.S.C. § 1677b(e)(1).

§ 1677b(a)(2).[4] Although the statute places third country prices and CV on a nearly equal footing, the regulations express a clear preference for third country prices. *See* 19 C.F.R. § 353.48(b)[5] ("[t]he Secretary *normally* will prefer foreign market value based on sales to a third country rather than on constructed value") (emphasis added). Nonetheless, ITA interpreted the statute and regulation as giving it discretion to disregard third country sales in favor of CV under "extraordinary circumstances." 55 Fed. Reg. at 20492.

ITA's interpretation was reasonable; third country prices may be abandoned if there is an adequate factual basis in the record for doing so. The statute and regulations cited above, and pertinent case law all support this conclusion. *See Smith-Corona Group v. United States*, 713 F.2d 1568, 1576 n.20 (Fed. Cir. 1983) (CV may be used without regard to availability of third country prices); *Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT ____, 704 F. Supp. 1114, 1124 (1989) ("*Asocolflores*") (though statute favors actual prices, ITA not required to find third country prices completely unusable before turning to CV). The next issue is whether substantial evidence in the record supports ITA's decision to reject third country prices.

2. *Substantial Evidence:*

ITA gave three reasons for rejecting third country sales: (i) United States and European price and volume movements were not "positively correlated"; (ii) third country sales occurred only in peak months, making it difficult to find contemporaneous sales; and (iii) the perishability of fresh cut flowers leads to price differences that are unrelated to dumping. 55 Fed. Reg. at 20492–493. Because of these factors, ITA concluded third country prices would not provide an accurate measure of dumping. 55 Fed. Reg. at 20943.

(i) *Lack of Correlation Between United States and European Markets:*

ITA identified several distinctions between United States and European markets which lead to price differences that can "either mask dumping in some instances or exaggerate" it in others. 55 Fed. Reg. at 20492. According to ITA, the United States market is characterized by "extreme price volatility" and pronounced peaks and lulls; in contrast, the European market is mature and demand is consistent throughout the year. *Id.* Europe supplies most of its own flowers, and during peak production periods Colombian flowers cannot be sold there easily. Euro-

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[4] *See supra* n.3.

[5] 19 C.F.R. § 353.48 provides, in part:

§ 353.48 Calculation of foreign market value if sales in the home market country are inadequate.

(a) *In general* * * *. [I]f the quantity of such or similar merchandise sold during the period being examined for consumption in the home market country is so small in relation to the quantity sold for exportation to third countries (normally, less than five percent of the amount sold to third countries) that it is an inadequate basis for the foreign market value of the merchandise, the Secretary will calculate the foreign market value of the merchandise under either § 353.49 [third country sales] or § 353.50 [constructed value].

(b) *Preference for third country sales.* The Secretary normally will prefer foreign market value based on sales to a third country rather than on constructed value if adequate information is available and can be verified, if a verification is conducted, within the time required.

19 C.F.R. § 353.48.

pean prices are primarily determined by the auction houses. Because producers must guarantee a certain volume to sell there, Colombian producers are usually prevented from participating. Finally, ITA noted that United States and European holidays often do not coincide, resulting in different peak periods.[6] 55 Fed. Reg. at 20492–20493. Although ITA used an extended one year period of investigation because of the cyclical nature of the flower market, it found that European and United States cycles did not coincide.

Given the presence of different price and demand patterns in United States and European markets, ITA correctly concluded that price differences might be the result of factors other than price discrimination. In light of market differences, reliance on third country prices likely would have produced misleading results. ITA's reasoning on this point was sound. In addition, its findings were supported by substantial evidence. Although citations to the record were not given, it appears that ITA relied heavily on three economic reports submitted by Asocolflores.[7] These reports provide ample support for ITA's findings.

(ii) *Third Country Sales Not Made over Entire Year:*

ITA also found that third country sales were made only in peak months, not over the entire year, making a fair comparison with United States sales difficult. 55 Fed. Reg. at 20493. ITA reasonably relied on this factor because a comparison of peak foreign and nonpeak United States prices likely would lead to inaccurate results, that is, unreasonably high margins. ITA's finding was supported by questionnaire responses, which indicated that most companies did not have sales to the European market in all months.

(iii) *Perishability Factor:*

On the supply side, ITA found that flowers are highly perishable, and subject to natural and economic forces unlike those facing nonperishable products. ITA noted that these difficulties are compounded because Colombian producers plan production for the United States market: in the event of excess production, producers might have to sell in unanticipated markets where they are vulnerable to market differences. Here again, ITA's consideration of this factor was reasonable, and its findings

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[6] The ITA's findings are set forth below:

> In general, the United States market is marked by extreme price volatility due to the sporadic gift-giving nature of U.S. demand and by very pronounced peaks during holidays and equally pronounced lulls during the off season. In Europe, there is a mature market for fresh cut flowers throughout the year that is not subject to the extreme volatility that marks the U.S. market. Europe supplies most of its own flowers, and at periods of peak European production, Colombian flowers cannot easily be sold there. European flower prices are primarily determined by auction houses, such as the Aalsmeer auction in Holland. Auction participants must guarantee the auction houses a certain amount of production each year in order to sell there. The Colombian flower growers cannot assure adequate flower production of the type and color demanded in European markets on a yearly basis and are prevented from participating in the Aalsmeer auction. In addition, European holidays often do not coincide with those [in] * * * the United States, resulting in different peak periods in the two markets. Even when holidays do coincide, the limited access of the Colombian growers to the European market does not assure them of obtaining peak prices.

55 Fed. Reg. at 20492–493.

[7] The reports were: Dr. German Botero, *Fresh Cut Flowers-Some Issues on the Estimation of Dumping Margins in the U.S. Market* ("Botero"); Sparks Commodities, Inc., *Methodological Issues Concerning the Department of Commerce Review of Dumping Margins for Colombian Cut Flowers* ("Sparks"); and Dr. Robert E. Litan and ICF Consulting Associates, *U.S. and European Prices of Colombian Cut Flowers: A Statistical Analysis* ("Litan"). FTC argues that two of the reports (Litan and Botero) were untimely and inadequately documented. These arguments are addressed *infra*.

concerning product characteristics and Colombian export patterns are supported by substantial evidence in the record.

At oral argument, FTC asserted ITA should have adopted a "company-specific" approach, and used third country price data, for the companies and during the months such data was available, and constructed value in other cases, as it did in some instances during the investigative phrase. FTC, however, failed to provide the court with specific data to indicated for which companies and time periods third country price information was available, and should have been used. In any event, even if FTC had supplied this information, utilization of third country prices would not account for different demand and pricing patterns in the United States and Europe.

B. *Calculation of Average Constructed Value for Companies that Did not Submit Cost Data:*

FTC argues ITA erred in using average CV for companies that did not submit adequate cost data.[8] ITA reviewed information for fifty producers. It did not request cost data, but thirty-nine producers voluntarily submitted cost as well as price information. Eleven producers did not provide complete cost information. Relying on best information available, ITA assigned each firm a weighted-average CV. 55 Fed. Reg. at 20493. ITA must use "best information available" whenever a party "*refuses or is unable to produce information requested* in a timely manner and in the form required." 19 U.S.C. § 1677e(c) (emphasis added); *see also* 19 C.F.R. § 353.37(a). Normally, however, ITA may not resort to the best information rule without finding "noncompliance with an information request." *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1574 (Fed. Cir. 1990). The government concedes that ITA did not request cost data initially, but notes that the decision to abandon third country prices was made late in the proceeding, and cost information was unavailable at that time. While this explains ITA's decision, the government does not offer authority that would justify use of best information in this case in the absence of an information request. Perhaps, in some situations, ITA may rely on averages to fill in incidental data rather than commencing an entirely new investigation. Here, ITA changed its basic methodology. It should have conducted a proper investigation based on its choice of a new methodology. ITA cannot simply average data from producers who volunteer unsolicited cost information. Such a procedure is highly suspect. Remand on this issue is necessary to permit collection of cost data from the eleven companies discussed.

C. *Reliance on Economic Reports:*

FTC claims that ITA's decision to rely on CV was premised on two economic reports that were untimely and inadequately documented.

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[8] FTC also argues that ITA erred in using cost data for the three companies whose price information had been verified. This argument is meritless. When ITA determined that third country prices were inappropriate, price information, whether verified or not, became irrelevant.

After the preliminary determination, respondents filed two economic reports, the Litan and Botero reports.[9] ITA found the reports "critical to a reasoned decision on the question of the appropriate basis for foreign market value," and retained them on the grounds that "the Department may request new information at anytime under 19 C.F.R. § 353.31(b)(1)." 55 Fed. Reg. at 20495.

ITA may reject factual information submitted after the preliminary determination. *See* 19 C.F.R. § 353.31 (a)(1)(ii); § 353.31(a)(3); § 353.31(b)(2). The regulations also provide that ITA may request additional information at *any time* during a proceeding. 19 C.F.R. § 353.31(b)(1).[10] Clearly, the regulations give ITA flexibility to obtain information necessary to its decision; if information it deems "critical" is submitted, albeit without a request, ITA has discretion under the regulations to consider it. Certainly, ITA abuses its discretion if it arbitrarily accepts information which is not truly critical. FTC has not shown such abuse. Moreover, FTC cannot claim prejudice because it was given a special opportunity to submit information in rebuttal, which it did.[11] 55 Fed. Reg. at 20945. In addition, FTC has not demonstrated that it has any truly contradictory data. This entire issue appears to rest on speculation.

FTC also claims the studies lacked supporting data. ITA acknowledged that "the reports do not indicate the sources of all of the information they rely upon," but found the reports "sufficiently well documented and explained to warrant serious consideration." 55 Fed. Reg. at 20494. ITA was correct. Certainly, each proposition in the reports is not substantiated; however, the general trends are documented and supported by evidence in the record so that the reports are worthy of consideration.

II. Asocolflores Challenges

A. *Monthly Average United States Price:*

Asocolflores argues ITA should have used annual rather than monthly United States prices ("USP"). Specifically, Asocolflores claims the fresh cut flower market is characterized by annual demand, and due to perishability of the product, growers are forced to make below-cost sales in certain months. According to Asocolflores, these below-cost sales are economically necessary, and cannot be characterized as dumping; monthly averaging makes no allowance for these sales, and, in es-

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[9] *See supra* n.8.

[10] 19 C.F.R. § 353.31(b)(1) provides:

> Notwithstanding paragraph (a) [time limits for submission of information] of this section, the Secretary may request any person to submit factual information at any time during a proceeding.

19 C.F.R. § 353.31(b)(1).

[11] Respondents submitted the reports on February 28, 1990. On April 3, 1990, five weeks later, ITA informed the parties that it would retain the reports in the record, and gave FTC thirteen days to respond. A.R. Pub. Rec. Doc. 199. At oral argument, FTC claimed that it did not have adequate time to respond to the reports; FTC claims it made this objection before ITA. FTC did not, however, provide citations in its brief or at oral argument to indicate that this objection was raised before ITA. Moreover, a review of the pertinent part of the record does not indicate that FTC either requested additional time, or objected to the time limits imposed on it. *See* A.R. Pub. Rec. Doc. 202. Without evidence of such an objection, FTC's argument that it lacked sufficient time to respond warrants no further consideration. Furthermore, this was not a new issue. FTC could have submitted its own economic data earlier in the case.

sence, measures "technical dumping." Asocolflores also argues that monthly averaging produces unrepresentative prices, is inconsistent with ITA's findings in this and other cases concerning the flower industry, and is unsupported by the record.

ITA has authority to select averages, as long as the averages are "representative of the transactions under investigation." 19 U.S.C. § 1677f–1(b); *see* 19 C.F.R. § 353.59(b)(1).[12] Indeed, this court has stated that ITA must select a methodology to account for industry characteristics so that price data is "representative of reality." *See Floral Trade Council of Davis, California v. United States*, 12 CIT 1163, 1168, 704 F. Supp. 233, 239 (1988) (ITA must adopt averaging or another methodology to account for flower perishability). Absent specific evidence that the averaging method resulted in margins that were unrepresentative, ITA's decision will be upheld. *See id.* at 1170, 704 F. Supp. at 239.

In this case, ITA used monthly averaging to account for perishability; it rejected annual averaging based on a finding that annual averaging would mask dumping by allowing high prices in peak months to offset low prices in other months. 55 Fed. Reg. at 20494 (Response to Comment 2). This court agrees that monthly averaging adequately compensates for the perishability factor,[13] but averaging over too long a period likely will obscure dumping. *See Floral Trade Council*, 12 CIT 1169–1170, 704 F. Supp. at 239–240 (monthly averaged USP upheld against claims that longer period should be used); *see Asocolflores*, 13 CIT at ____, 704 F. Supp. at 1116 (monthly averaged USP upheld).

The record in this case reveals the tension found in previous cases involving this product between prejudice to producers if prices are not averaged and potential for masking dumping if prices are averaged over too long a period. Asocolflores wants ITA to adjust for the life cycle of flowers; that is, plants grow even in off-peak sales periods. In states that this may be viewed as another perishability factor. As indicated, selecting an averaging period is difficult. No period accounts for the legitimate concerns of all parties. Monthly averaging is one acceptable compromise. ITA averaged over what it considered the shortest period possible to ensure that dumping was not obscured entirely, and at the same time, to account for as many perishability factors as possible.

Asocolflores' argument concerning technical dumping was addressed in a previous case. There, this court determined that the peculiarities of the flower industry do not justify an overall negative determination. *See*

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[12] 19 U.S.C. § 1677f–1(b) provides:

> The authority to select appropriate samples and averages shall rest exclusively with the administering authority; but such samples and averages shall be representative of the transactions under investigation.

19 U.S.C. § 1677f–1(b).

19 C.F.R. § 353.59(b)(1) provides:

> In calculating United States price or foreign market value, the Secretary may use averaging or generally recognized sampling techniques whenever a significant volume of sales or number of adjustments are involved.

19 C.F.R. § 353.59(b)(1).

[13] Weekly averaging probably would adjust adequately for most perishability problems. Monthly averaging also tends to even out the impact of holiday sales and post-holiday effects.

Asocolflores, 13 CIT at ____, 704 F. Supp. at 1120. In any event, it is for the International Trade Commission to determine if imports sold at less than fair value ("LTFV") cause injury, or if LTFV sales are merely the result of meeting prevailing domestic industry prices and are not injurious.[14] While ITA is free to adjust its methodology to measure dumping margins as precisely as possible, it cannot abandon statutory and regulatory procedures because it believes foreign producers' actions are dictated by the domestic market.

Asocolflores also argues that the combination of monthly averages for USP and CV for FMV has the ultimate result of guaranteeing affirmative dumping margins for any month in which producers do not make an eight percent profit.[15] This may be the effect of ITA's choices concerning USP and FMV, but it is the effect of the application of the statute and regulations at various stages. Why producers should be protected if their annual profit is eight percent, as would seem to be the result of Asocolflores' proposed method, has not been explained.

Use of CV necessary averaging may yield unsought results. Congress authorized the use of CV and averaging not because they are desirable methods, but because certain situations necessitate their use. While foreign producers may have received a higher than theoretically desirable rate partially based on the economic necessity of below-cost sales in certain months, it seems equally likely that the rate is somewhat lower than theoretically desirable because of the use of constructed FMV, rather than actual prices. As with the use of best information available, the collateral effects of these methodologies are not always desired. Use of actual prices and sale-by-sale USP data is the ideal situation. These choices are not suitable for this industry, and Asocolflores does not argue for their use.

The court view ITA's overall methodology as acceptable, both in terms of literal adherence to the law and in terms of equity and fairness. None of the parties have offered a better approach and the court has not thought of one. While there is no guarantee that the results are exactly what they should be, they seem to be as fair as possible given the difficulties presented by the perishable commodity at issue.

B. *Calculation of Sample Group Rate and All Other Rate:*

Asocolflores raises several arguments with respect to calculation of the "sample group" and "all other" rates. The government contends these arguments were not raised before ITA. As an initial matter, there-

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[14] In a final antidumping investigation, the International Trade Commission ("ITC") determines whether a United States industry is materially injured, or threatened with material injury, by reason of imports or sales of the merchandise under investigation. 19 U.S.C. § 1673(2)(A)(i)–(ii). In making this determination, the ITC considers, among other factors, the effect of imports on domestic prices, *see* 19 U.S.C. § 1677(7)(B)(i)(II), and whether there has been significant price underselling, or imports have depressed or suppressed prices to a significant degree. 19 U.S.C. § 1677(7)(C)(ii)(I)–(II). To determine whether theprice underselling has occurred, ITC considers whether the prices of imported goods are below the level necessary to meet competition. *See e.g., British Steel Corp. v. United States*, 8 CIT 86, 96, 593 F.Supp. 405, 412–13 (1984) (record indicates prices below level required to meet competition); S. Rep. No. 93–1298, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 7186, 7316 (when products sell at prices not lower than prevailing United States prices, dumping likely to be technical and not injurious to domestic market).

[15] Eight percent is the minimum CV profit factor. 19 U.S.C. § 1677b(e)(1)(B)(ii).

fore, the court must determine which arguments were presented to ITA because, absent exceptional circumstances, an administrative determination will not be set aside upon a ground not presented to the agency. *See Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

ITA has authority to use "representative" samples. 19 U.S.C. § 1677f–1(b). This review covered 218 firms. Thirty-five firms requested a review of themselves ("self-requesting firms"), and petitioner requested a review of the remaining 183 firms. Thirty-three of the 183 firms had no exports, leaving 150 firms ("sample universe") subject to review. From the 150 firms, ITA selected fifteen firms at random, eleven small and four medium or large, and calculated margins for each group. Then, the margins of the two groups were weight-averaged using the export shares of each group to arrive at the overall weighted average margin, or the "sample group" rate. This sample group rate, 4.16 percent, was applied to 135 firms in the sample universe; the fifteen sampled firms received their own individual rates.

ITA applied an "all other" rate of 2.42 percent to the thirty-three firms that had no exports during the review period. This "all other" rate represents the simple average of the weighted-average rates for the (1) sample group; and (2) self-requesting group. 55 Fed. Reg. at 20493.

Asocolflores raises three arguments. First, Asocolflores claims ITA gave undue weight to margins for small firms because in calculating the sample rate, ITA weight-averaged margins for the sampled companies by the total volume of exports of all companies within the sample universe, rather than only the sampled companies. Asocolflores contends it raised this issue before ITA; however, it does not appear from the document to which Asocolflores refers the court that the argument made here was also made at the administrative level. *See* 1 Pub. Rec. 169. At best, the document is ambiguous as to the argument raised, and cannot be said to put ITA on notice as to the problem.

Asocolflores' second argument, concerning exclusion of the self-requesting companies, was clearly raised before ITA. 3 Pub. Rec. 182 at 70. At oral argument, Asocolflores conceded that it did not raise its third argument concerning calculation of the "all other" rate, but claims it had no opportunity to do so. This is incorrect since the summary calculation work sheets prepared for the preliminary results clearly indicate that the "all other" rate was based on a simple average. Supp. Pub./Prop. Doc. 75. As a result, the court will not consider Asocolflores' argument concerning the "all other" rate. Out of an abundance of caution, the first ambiguously-raised argument will be addressed, as well as the second argument, which was clearly raised.

Asocolflores' first argument is that the sample group rate is skewed unfairly towards margins determined for small firms, which had higher margins than the medium and large firms. Small firms accounted for approximately forty-six percent of exports for the sample universe; medium and large firms accounted for fifty-four percent. In arriving at the

margin for each group, ITA weight-averaged each groups' margin by the percentage representing its share of exports for the sample universe. Asocolflores argues that ITA should have weight-averaged each groups' margin based on a percentage representing its share of the *sampled* companies' exports.[16] As the government correctly points out, the purpose of the sample was to obtain a representative rate for all firms in the sample universe; therefore, the only relevant percentage was each group's relation to the sample universe.

Asocolflores' second argument – that the sample group rate is not representative because ITA did not include the self-requesting firms in its calculations – fails for a similar reason. The purpose of sampling was to determine a rate only for the 150 firms in the sample universe; the self-requesting companies were not part of the sample universe.

C. *Double-Counting Credit Expense in Constructed Value:*

Asocolflores claims, and the government concedes, that when it calculated CV ITA double-counted credit expense. In calculating FMV, ITA makes adjustments for differences in the circumstances of sale between United States and foreign markets; an adjustment is made for differences in credit terms. *See* 19 U.S.C. § 1667b(a)(4)(B); 19 C.F.R. §§ 353.56(a)(1)–(2). In this case, it appears that ITA made an adjustment for credit expense; that is, the cost of financing accounts receivable or extending credit to United States customers.[17]

Interest expense, or the cost to the company of financing its debt, is one of the components of CV. *See* 19 U.S.C. § 1677b(e)(1)(B) (CV includes amount for general expenses); 19 C.F.R. § 353.50(a)(2) (same); *East Chilliwack Fruit Growers Coop. v. United States*, 11 CIT 104, 107, 655 F. Supp. 499, 503 (1987) (general expenses include cost of financing). ITA assumes that part of the debt is credit expense – the amount used to finance accounts receivable. Because credit expense has already been accounted for through the circumstance-of-sale adjustment, in calculating CV, ITA routinely deducts from interest expense an amount that represents credit expense. *See Roller Chain, Other than Bicycle, From Japan*, 55 Fed. Reg. 42602, 42604 (1990) (in CV calculation interest expense reduced by amount related to accounts receivable to allow for credit costs already added to CV); *Mechanical Transfer Presses from Japan*, 55 Fed. Reg. 335, 337 (1990) (same); *64K Dynamic Random Access Memory Components (64K DRAM's) From Japan*, 51 Fed. Reg. 15943, 15949 (1986) (Response to NEC Comment 4) (same). Without such an adjustment, credit expenses would be double-counted in CV. *See 64K DRAMs*, 55 Fed. Reg. 15949.

ITA failed to make the necessary adjustment for credit expense. This error affects five companies: Floral/Bochica, Flores de Serrezuela, La

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[16] Here, the percentages differed. Small firms accounted for only fourteen percent of exports for the eleven sampled companies exports; the medium and large companies accounted for eighty-six percent.

[17] According to Asocolflores, the credit-expense adjustment was made as follows: in cases where USP was based on Exporter's Sales Price, ITA deducted credit expense from USP; in cases where USP was based on Purchase Price, ITA added credit expense to FMV. Asocolflores does not provide citations to the record. Exporter's Sales Price and Purchase Price are defined in 19 U.S.C. §§ 1677a(b)–(c).

Valvanera, Florandia, and Jardines del Muna. On remand, ITA shall make the necessary adjustments.

D. *Street Vendor Sales:*

Asocolflores' next argument is that ITA improperly included sales to street vendors in the United States in USP calculations for Floral/Bochica and Inversiones Targa. ITA characterized these sales as "distress" sales, and refused to exclude them, finding that distress sales consist of the same class or kind or merchandise as export quality flowers. 55 Fed. Reg. at 20500 (Response to Comment 66).

As the government correctly points out, if merchandise enters the United States as "export quality," it is included in the calculation of USP because it is within the scope of the investigation: the fact that the merchandise subsequently deteriorates and is sold on the street at a lower price is irrelevant. Averaging already accounts for perishability, and all United States sales both in and out of the ordinary course of trade are included in calculating USP.[18] Here, Asocolflores does not point to any evidence in the record to indicate that flowers sold by street vendors were of inferior quality when they entered the United States. In the absence of such evidence, street vendor sales were properly included.

To be consistent, street vendor sales also should have been included in the calculation of inland freight in Colombia. The denominator used to calculate inland freight was sales volume, excluding street vendor sales. Because street vendor sales were included in USP data, they should also have been included in calculating the inland freight charge. This issue affects Floral/Bochica. ITA will make the necessary adjustment on remand.

E. *Exclusion of Certain Revenue Accruing to Dianticola Colombiana:*

Both Asocolflores and the government seek a remand to permit ITA to adjust for revenues deposited by Dianticola's consignment agent into a United States bank. The record indicates that Dianticola sells its flowers on consignment to an agent in Miami, who deposits [*] percent of gross sales revenue into a United States bank account. *See* 4 Prop. Rec. 226–239A. Dianticola included this amount in its "total revenue" for calculation of USP, *id.*, but ITA recalculated USP without regard to this income, finding no proof that revenues were related to sales under consideration. 55 Fed. Reg. at 20498 (Response to Comment 36). Failure to include these revenues in the USP calculation decreased Dianticola's USP, thereby increasing its dumping margin. In fact, Dianticola's questionnaire response indicated that the income represented a percentage of sales revenues from flower sales. *See* 4 Prop. Rec. at 226–239A. ITA should have included these revenues in calculating Dianticola's USP; in

[18] In *Ipsco, Inc. v. United States*, 12 CIT 384, 687 F. Supp. 633 (1988), this court noted that the statutes and regulations concerning FMV provide for consideration only of sales in the "ordinary course of trade," whereas no corresponding provisions exist for USP. 12 CIT at 393–94, 687 F. Supp. at 640–41; *Compare* 19 U.S.C. § 1677b(a)(1); 19 C.F.R. §353.46(a)(1), § 353.46(b) *with* 19 U.S.C. § 1677a and 19 C.F.R. § 353.41. Hence, United States sales both in and out of the ordinary course of trade are included in the USP calculations.

the alternative, if ITA was unsatisfied with the questionnaire response, in fairness, a deficiency letter should have been issued. On remand, the necessary adjustments shall be made.

F. *Calculation of Constructed Value for Flores El Trentino:*

Both Asocolflores and the government seek a remand to correct a clerical error concerning calculation of CV for Flores El Trentino. The record indicates that the correct CV for Flores El Trentino was [*] pesos per carnation. 6. Prop. Rec. at 2121A. In calculating the dumping margin, ITA used another figure, 25.5248 pesos. *See* 7 Prop. Rec. at 1315A. This error is to be corrected on remand.

G. *Offsets to Financial Expenses:*

Asocolflores claims ITA erred in failing to offset financial expenses of Floral Ltda./Exportaciones Bochica ("Floral"), and La Valvanera ("Valvanera") by exchange rate gains and interest income.

Constructed value includes the cost of producing the particular merchandise under consideration and an amount for general expenses. *See* 19 U.S.C. § 1677b(e)(1)(A)–(B); 19 C.F.R. § 353.50(a)(1)–(2). In calculating CV in at least one previous case, ITA has adjusted general expenses to account for exchange rate gains and losses. *Offshore Platform Jackets and Piles from the Republic of Korea*, 51 Fed. Reg. 11795, 11796 (1986). In addition, ITA has allowed interest expenses to be offset by interest income if that income is earned from short-term investments related to current operations of the company. *Certain Small Business Telephone Systems and Subassemblies Thereof From Taiwan*, 54 Fed. Reg. 42543, 42545 (1989); *see Cellular Mobile Telephones and Subassemblies From Japan*, 54 Fed. Reg. 48011, 48016 (1989) (Response to Comment 16).

In its questionnaire response, Floral deducts "exchange rate gains and other debt-related income" from interest expense. 5 Prop. Rec. 399A, Annex D-8. Valvanera includes "exchange rate gains and losses" in the general expense component of CV. 5 Prop. Rec. 1630A. The Department's questionnaire specifically requests itemization of all offsets to expenses, and an explanation as to the manner in which offsets relate to production of the subject merchandise. *See* 1 Pub. Rec. 575.[19] Neither Floral nor Valvanera provided a proper itemization, nor did they explain how offsets were related to flower production. *See* 5 Prop. Rec. 399A (Floral); 5 Prop. Rec. 1630A, 1712A (Valvanera); *see* 7 Prop. Rec 851A (Floral. As the companies failed to comply with clear instructions in the questionnaires, ITA's decision was proper.

Asocolflores protest that ITA should have issued a deficiency letter. Certainly, if the companies made a good faith attempt to respond to ITA's questionnaire and substantially complied with the request, ITA

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* Confidential information deleted.

[19] The document indicates service on Floral Ltda. The court assumes that Valvanera was served with the same questionnaire.

might have an obligation to issue a deficiency letter. Where, however, a company utterly fails to comply with a clear request, no obligation to issue a deficiency letter arises. In light of the unambiguous request and feeble responses, deficiency letters were not required.

H. *Normalization of Costs:*

1. *Florandia Herrera-Camacho:*

Asocolflores claims ITA failed to amortize start-up costs for Florandia Herrera-Camacho's pompon crop, and failed to normalize movement charges associated with United States pompon sales. Florandia Herrera-Camacho began growing pompons in 1988. The first two crops were improperly fertilized; the company experienced low yields of export-quality pompons, and many flowers shipped to the United States were destroyed or returned for credit due to their poor condition. Florandia treated costs associated with these low yields as start-up costs, and amortized them over the production cycle. It also amortized costs associated with movement and selling expenses. ITA denied the adjustments, finding "insufficient historical evidence of normal production and sales to support the claim that this was an abnormal situation." 55 Fed. Reg. at 20493.

ITA did not provide a sufficient basis for rejecting the claimed adjustments. Because these were "start-up" costs, no record of past performance existed. Florandia produced data to show comparative costs for the period March 1989 to September 1989, when its production reached normal levels. Upon remand, ITA should reconsider this issue in light of the comparative data provided by Florandia. The government's argument that these types of costs are not "abnormal" is not reflected in ITA's findings, thus the court declines to consider it.

2. *Flores La Valvanera and Flores Dos Hectareas:*

Asocolflores also claims ITA should have adjusted constructed values for Flores La Valvanera and Flores Dos Hectareas to account for abnormally low yields due to natural disasters. In La Valvanera's case, the low yield was caused by an "unexpected and extraordinary (sic) extremely hard viral attack which left the plants with yellow foliage." 3 Pub. Rec. 98–99 at 31–32. In Dos Hectareas' case, the low yield was caused by collapse of an irrigation well. 3 Pub. Rec. 394–403.

ITA refused to adjust CV to account for these natural disasters. ITA found that La Valvanera failed to provide information as to what it considers "unusual" damage, or as to its "normal" or "expected" production levels. 55 Fed. Reg. at 20501 (Response to Comment 70). Similarly, ITA found that Dos Hectareas failed to provide sufficient or timely information concerning the existence or magnitude of the problem, and its projected or historical production yield. 55 Fed. Reg. at 20496 (Response to Comment 22).

ITA erred in rejecting the claimed adjustments on the grounds of insufficient information. Both companies provided *some* information as to the unusual nature of the events; in addition, it appears that both com-

panies provided information concerning expected production. In the event that ITA believed information provided was inadequate, under these circumstances, it should have given notice of the deficiency, and provided an opportunity to supplement the record. The case is remanded on this point to allow the parties to supplement the record, and for further findings.

CONCLUSION

This case is remanded for further consideration in accordance with this opinion with respect to the following issues: calculation of constructed value for companies not submitting cost data; credit expense adjustment; inland freight charges and street vendor sales; exclusion of revenues accruing to Dianticola; constructed value for Flores El Trentino; and normalization of costs to account for low yields and natural disasters. In all other respects, ITA's determination is affirmed.

(Slip Op. 91–91)

ENRON OIL TRADING AND TRANSPORTATION CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 87–09–00934

OPINION

Plaintiff contests the liquidation of four entries of petroleum products by Customs more than one year after the dates of entry. Plaintiff asserts that liquidation occurred by operation of law one year after the dates of entry and that it did not receive notices of extension time for liquidation. Defendant asserts that the notices were mailed, and that plaintiff is deemed to have received them.

Held: Both parties' motions for summary judgment are denied. The presumptions supporting the giving of notice by Customs are rebutted by plaintiff's affidavits of non-receipt. The government failed to prove that notice was given. The entries were liquidated by operation of law under 19 U.S.C. § 1504 (1980).

(Decided September 27, 1991)

Herbert Peter Larsen, for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, United States Department of Justice, (*Bruce N. Stratvert*) for defendant.

BACKGROUND

MUSGRAVE, *Judge*: Plaintiff, Enron Oil Trading & Transportation Co. ("Enron" herein) is the successor in interest to P & O Falco Inc. ("Falco"), the importer of record of four entries of petroleum products imported in 1984. Each entry was made under TSUS item 475.65 as "Hydrocarbon mixtures, not specially provided for, derived wholly from

petroleum * * * which contain by weight not over 50 percent of a single hydrocarbon compound: In liquid form," at the duty rate of 0.25 cents per gallon. In 1986, the Customs Service issued notices of liquidation of the four entries showing dates of liquidation approximately two years after the respective entry dates. Liquidation for each entry was under TSUS item 475.25 as "Motor Fuel" at a duty rate of 1.25 cents per gallon.

Plaintiff contends that it did not receive any notice of extension of the time for liquidation and that the entries were therefore liquidated by operation of law pursuant to 19 U.S.C. § 1504 (1980).[1] Defendant asserts that notices were mailed to Falco, that Falco is deemed to have received them, and that the mailed notices are merely courtesy notices, whereas formal notices were affixed to the customhouse bulletin board. Both parties have moved for summary judgment.

Standard of Review

Entries of merchandise not liquidated within one year are deemed liquidated at the rates asserted at the time of entry. 19 U.S.C. § 1504(a). Customs may extend the period in which to liquidate an entry "by giving notice to the importer, his consignee, or agent in such form and manner as the Secretary shall prescribe in regulations." 19 U.S.C. § 1504(b). The relevant regulation in turn provides for notice to "the importer or the consignee and his agent and surety on Customs Form 4333–A, appropriately modified, that the time has been extended and the reasons for doing so." 19 C.F.R. § 159.12(b) (1991). Since the extension is made "by giving notice," in the absence of such notice, liquidation occurs by operation of law. *See Pagoda Trading Co. v. United States*, 9 CIT 407, 411, 617 F. Supp. 96, 99 (198t); *aff'd*, 84 F.2d 665 (Fed. Cir. 1986).

Defendant argues that the notice required by the statute is accomplished through posting Customs Form 4333 at the customhouse, and that the mailed notice on form 4333–A is merely a courtesy notice. This argument is to no avail, as defendant nowhere states that notice on Form 4333 was in fact posted. Moreover, the plain language of the regulation refutes this contention. In contrast with 19 C.F.R. § 159.9 (1991) which governs notices of liquidation and expressly states that Customs "will endeavor" to provide importers with "courtesy notice" that shall not serve as formal notice, the language of 19 C.F.R. § 159.12(b) is mandatory and without qualification. Form 4333–A notice was not provided to plaintiffs in any manner other than through Customs' regular practice of mailing. The question is thus whether Customs' regular practice of mailing was accomplished and accomplished its task in this case.

Defendant rises two related presumptions on this point. First, to establish mailing, defendant relies upon the presumption that government officials perform their duties in the manner required by law. *E.g., Star Sales & Distributing Corp. v. United States*, 10 CIT 709, 710, 663 F. Supp. 1127, 1129 (1986). Second, proof of mailing raises a presumption

[1] 19 U.S.C. § 1504 was amended in 1984 by public law 98–573 § 191(d). The amendments apply only to articles entered on or after October 30, 1984. Pub. L. No. 98–573 § 195(a) (1984). The latest date of entry at issue in this case is May 7, 1984. The 1984 amendments thus do not apply in this case.

of delivery. *F.W. Myers & Co. v. United States*, 6 CIT 215, 216, 574 F. Supp. 1064, 1065 (1983). The presumptions are not conclusive: "[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such part the burden of proof in the sense of risk of nonpersuasion, which remains * * * upon the party on whom it was originally set." Fed. R. Evid. 301.

When notice must be given by the Customs Service, the burden of going forward with evidence initially falls upon the plaintiff due to the presumption of regularity attaching to official acts, but the burden of proof remains on the government because it is the government's responsibility to provide the notice. *Intra-Mar Shipping Corp. v. United States*, 66 Cust. Ct. 3, 6 (1971). When the plaintiff has met the initial requirement of negating the presumed delivery by evidence of non-receipt, non-issuance or non-delivey of the notice, the burden falls upon the government to establish that notice was given. *Intra-Mar*, at 6.

SUMMARY JUDGMENT

Both parties have moved for summary judgment. Summary judgment can be entered only if the pleadings and other documents on file show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(d), Rules of the Court of International Trade. The party seeking summary judgment must demonstrate that there is no dispute as to any material fact in the case. *Warrior Tombigbee Transp. Co. v. M/V Nan Fung*, 695 F.2d 1294, 1296 (11th Cir. 1983). Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the factual inferences to be drawn from these facts. *Warrior Tombigbee*, at 1296. Although the parties do not dispute the majority of circumstances in this case, the facts which may be inferred from those circumstances remain at issue.

EVIDENCE

Plaintiff submits the affidavit of Mr. Jeff Anthony Harbert. The affidavit states as follows: Mr. Harbert has worked for Falco and its successor Enron continuously for the past nine years. During the times relevant to this case, it was the regular business practice of both Enron and Falco to forward any documents received from the Customs Service to Mr. Harbert's office. He maintained a file for each product contract in this case, and it was his regular practice to lodge all of the documents that he received pertaining to a particular importation in the appropriate contract file. He has searched these files and found no trace of any notice of liquidation of the four entries at issue. He has no recollection of ever receiving or viewing any notice of extension, and believes that neither Falco nor Enron ever received such notices.

Plaintiff also submits the affidavit of its attorney in this case, Mr. Herbert Peter Larsen. Mr. Larsen states that he has personally ascertained that diligent searches of the relevant files in the offices of the surety for

the entries, Commercial Union Insurance Companies, have been undertaken and that no notices of extension or liquidation nor any records of receipt of such notices have been found. He does not state how he has ascertained this information.

The government submits the affidavits of Customs Service employees with expertise in the operation of Customs' Automated Commercial System ("ACS"), a computer system which tracks and processes all Customs entries. Customs extends the time for liquidation by recording the extension information onto ACS, which then automatically prints the notices. Hines Declaration ("H.D.") at 1. They are printed and processed on weekends, and separated and stacked in trays for pickup by the U.S. Postal Service. Fouch Declaration ("F.D.") at 3. With respect to possible malfunctions, the employee who supervised printing of notices stated, "*If*, for example, an operator *notices* that the printer is not operating properly or that the notices have been bent or torn, the processing *may* be stopped and the damaged notices *can* be reprinted." F.D. at 3.[2] Approximately 28,000 extension and suspension notices are printed weekly. F.D. at 1. In part due to the volume printed, Customs does not maintain paper copies of extension notices, but stores information relating to notices in a computerized history file. H.D. at 2.

Accompanying these employee affidavits, the government submits a computer printout of the records from the history file corresponding to the notices at issue. Exhibit A to Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment, ("C.P.") In all, records of fourteen notices (seven for Falco and seven for the surety) are shown as printed on five different days. C.P.; H.D. at 4–5. The printout lists the name and address for the addressee of each notice, and has columns labeled "EXT/SUSP CODE," "MAIL CYCLE," and "RUN DATE," in addition to columns stating the entry number and other information for each notice. C.P. Customs' computer programmer stated that a "1" in the "EXT/SUSP CODE" column indicates that the liquidation of the entry has been suspended because additional time is needed to process the entry. H.D. at 3–4. Each record had a "1" in the "EXT/SUSP CODE" column. C.P.

The "MAIL CYCLE" and "RUN DATE" columns on this printout contain defendant's sole evidence in support of timely notification under 19 U.S.C. § 1504(b). The "MAIL CYCLE" column contains a code which identifies the year and weekly mail cycle in which the corresponding notice was printed. H.D. at 4. The "RUN DATE" column contains the actual date that the notice was printed. The record for the notice of the first extension of liquidation of each entry at issue has a code in the "MAIL CYCLE" column identifying a weekly cycle less than one year from the date of entry. H.D. at 4. All of the notices of the first extension for Falco were printed in one mail cycle; those for the surety, in the next.

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[2]Emphasis added.

C.P. However, the Customs Service did not begin recording the actual dates that notices were printed until after the dates corresponding to the mail cycles shown for the notices of the first extensions. H.D. at 4. The "RUN DATE" column for each notice of the first extension thus contains "00/00/00." C.P. The notices of the second extensions were generated after Customs began recording the actual date of printing and show dates less than two years after the date of entry in the "RUN DATE" column and "000" in the "MAIL CYCLE" column.

The records for the notices of the first extensions differ from those of the second extensions in other ways. The entry numbers listed for the notices of the first extensions do not show the last digit. For example, the record of the notice of the first extension of entry number 84–342954–7 shows the entry number as "0342954," while the record of the notice of the second extension shows the entry number as "3429547." C.P. Similarly, extra zeroes appear in the importer number and zip codes in the records of the second extension notices but do not in the earlier records.

The government also submits the affidavit of an import specialist responsible for petroleum products. Cox Declaration ("C.D.") While he does not recall the specific entries in question, he was responsible for petroleum product entries at the ports and times in question. C.D. at 2. He stated that he regularly received a report of entries which remained unliquidated after nine months, and would determine if more information were required and whether the time to liquidate those entries should be extended. C.D. at 2. When he made a determination to extend the time to liquidate an entry, he would direct that the appropriate data be entered into the Customs computer system. C.D. at 2. Without such action, no extension or notice could issue. C.D. at 2.

Customs laboratory reports for each of the entries are also before the Court. Exhibit A to Defendant's Reply Brief In Support of its Cross-Motion for Summary Judgment ("L.R."). These reports are dated approximately three months after the mail cycles identified in the history file for the notices of the first extension, and approximately eleven months before the run date of the notices of the second extension. L.R., C.P. Each of these identifies the subject merchandise as gasoline, and only one refers to a request for additional information.

ANALYSIS

Initially, the Court notes that 19 U.S.C. § 1504 is a direct mandate to Customs to act within a specific time or adequately extend that time, and is designed for the benefit of importers. *Pagoda*, 9 CIT at 411, 617 F. Supp. at 99. The intent of the statute is to relieve importers of prolonged uncertainty and to conform with international expectations interpreted to require that duty liabilities should be ascertained and fixed generally within a year after entry. *Ambassador Division of Florsheim Shoe v. United States*, 748 F.2d 1560, 1565 (Fed. Cir. 1984). The mechanized mailing of ten of thousands of notices of extensions each week would seem to flout both the letter and spirit of the statute.

Despite the parties' assurances to the contrary, an issue of material fact remains: whether notice was mailed to Falco. Plaintiff's affidavit from Mr. Harbert is sufficient to rebut the presumption that notice given. *Cf. Myers*, 6 CIT at 217, 574 F. Supp. at 1066. This issue requires the Court to weigh the evidence before it, therefore plaintiff's motion for summary judgment and defendant's cross motion for summary judgment are denied.

The government had the burden of establishing that notice was given to plaintiffs. The affidavits and admissions before the Court do not establish the fact. During oral argument, defendant declined the opportunity to present additional evidence on this question and indicated that it had nothing to add to the affidavits now before the Court. Tr. at 21. Accordingly, the Court will proceed on the record before it. Rule 56(e), Rules of the Court of International Trade.

No individual stated directly that the notices were printed or mailed, which is not surprising given the huge volume of notices processed weekly by Customs. The government also produced no tangible evidence on this point, as a result of its understandable adoption of a paperless record-keeping system. However, it is evident from the computer printout furnished by Customs that changes in the operation of this paperless system took place between the processing of the first and second extensions. The "MAIL CYCLE" code identifying the dates for printing the first extension notices was apparently generated before printing, and no date of actual printing is included in the records for those notices. Thus it is not clear if the "MAIL CYCLE" code verifies that the notices of the first extension were actually printed during that mail cycle, or were simply scheduled for printing. Moreover, the assurances of quality control given in the affidavits do not inspire unshakable faith in the regularity of the printing process-"if an operator notices [a problem] * * * notices can be reprinted." F.D. at 3. Nowhere is it stated that operators are even present at each machine.

It is also apparent why Customs needed extensions of time to liquidate these entries. No record is kept of the reasons for the extensions other than the fact that more time was required. The laboratory reports indicate that Customs had identified the merchandise as motor fuel months before the second extension was made. If additional information was required, what information and why it was needed remains unknown.

Plaintiff's evidence of non-receipt by Falco (the importer of record) is simple and clear, although circumstantial. The evidence of non-receipt by the surety is less firm, coming as it does from an affiant who gives no indication of his competence except that he "personally ascertained" that no record of notice existed in the surety's files. However, plaintiff need only establish that no notice was given the "importer, his consignee, or agent". 19 U.S.C. § 1504. Evidence of non-receipt by the surety merely adds some support to that inference.

The Court concludes that Customs has failed to meet its burden of proving notice as against plaintiff's proof of non-receipt. Therefore, the entries were liquidated by operation of law one year from their respective dates of entry. 19 U.S.C. § 1504. No protest or voluntary reliquidation was made within the ninety days allowed by statute, 19 U.S.C. §§ 1501, 1514(c)(1) (1991), nor was reliquidation pursuant to 19 U.S.C. 1520 (1991) (Refunds and errors) made within one year, and no allegations of fraud appear. 19 U.S.C. § 1521 (1991) (Reliquidation on account of fraud). The liquidations at the rates asserted at entry are conclusive upon all parties and Customs' subsequent attempts at liquidation are invalid. 19 U.S.C. § 1514.

The Court determines that although the attempted reliquidations by Customs were invalid, plaintiff's protests were valid, filed as they were within 90 days after notice of liquidation. 19 U.S.C. § 1514(c)(2)(A); *Pagoda*, 804 F.2d at 667; *See also Detroit Zoological Society v. United States*, 10 CIT 133, 630 F. Supp. 1350, 1355, n.7 (1986). This action contests the denial of those protests, and jurisdiction is thus proper under 19 U.S.C. 1581(a) (1991).

Accordingly, Customs is directed to assess duties as proposed on entry, and to refund any excess monies collected to plaintiff, with interest as allowed by 19 U.S.C. § 1520 on any such excess collected as increased or additional duties pursuant to the invalid liquidations.

(Slip Op. 91–92)

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW AND UAW LOCAL 136, PLAINTIFFS *v.* U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 90–07–00325

[Remanded.]

(Decided October 2, 1991)

Jordan Rossen, General Counsel, International Union, UAW, *Leonard R. Page*, Associate General Counsel, International Union, UAW, (*Richard W. McHugh*), Associate General Counsel, International Union, UAW, for plaintiffs.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, (*Vanessa P. Sciarra*); *Gary Bernstecker*, United States Department of Labor, for Defendant.

MEMORANDUM OPINION

DICARLO, *Judge*: Plaintiffs, former employees of a Chrysler assembly plant in Fenton, Missouri, challenge the Department of Labor's denial of certification for trade adjustment assistance benefits under 19 U.S.C. § 2272 (1988). This Court has jurisdiction under 19 U.S.C. § 2395 (1988) and 28 U.S.C. § 1581(d)(1) (1988).

BACKGROUND

Trade adjustment assistance is available to workers separated from employment when Labor determines, *inter alia*,

> that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

19 U.S.C. § 2272 (a)(3) (1988). Labor denied plaintiffs' petition claiming that they did not satisfy this requirement.

Plaintiffs assembled "G-body" and "J-body" vehicles, which Chrysler sells as Dodge Daytonas and Chrysler LeBarons. The Daytona is a two-door vehicle with a wheelbase of 97 inches. The 1988 Daytona had a base price of $9,409 and the 1989 model had a base price of $9,734. Revised Brief In Support of Petitioners' Rule 56.1 Motion For Review of Administration Record at 3–4 ("Petitioners' Brief"). The LeBaron is a two-door vehicle with a wheelbase of 100.3 inches and is manufactured in coupe and convertible versions. *Id.* at 3. The LeBaron coupe had a 1988 base price of $11, 420 and the convertible had a base price of $13,920. In 1989, the base price of the coupe was $11,944 and the base price of the convertible was $14,475. *Id.* at 3–4.

In order to determine whether increased imports of like or directly competitive articles contributed to the workers' separations, Labor examined changes in domestic and import market share. Labor began its analysis by using an accepted industry source to ascertain the characteristics of the subject vehicles and compiling a list of domestic and imported models it considered "like or directly competitive" with the subject vehicles. Next, Labor compared changes in the amount of retail sales to determine whether the decrease in sales of the subject vehicles is attributable to an increase in sales of domestic or imported vehicles.

Labor found that the Daytona and LeBaron would compete with cars having the following characteristics:

1. Base (stripped) prices $10,000 – $12,000;
2. Fully-equipped prices significantly under $20,000;
3. Two-door 2+2 or convertible body styles;
4. Curb weight under 3000 pounds;
5. Wheel base no more than 101 inches;
6. Significant sporting characteristics.

Conf. R. 47; *see also* Defendant's Memorandum In Opposition To Plaintiffs' Motion For Judgment Upon the Administrative Record at 9. ("Defendant's Brief") (footnotes omitted).

DISCUSSION

Labor's findings must be upheld if they are supported by substantial evidence in the record and are in accordance with law. 19 U.S.C. § 2395 (1988); *Woodrum v. Donovan*, 5 CIT 191, 193, 564 F. Supp. 826, 828 (1983), *aff'd sub. nom. Woodrum v. United States*, 2 Fed. Cir. (T) 82, 737 F.2d 1575 (1984). In addition, Labor's determination must be based on a reasoned analysis. *International Union, United Auto., Aerospace &*

Agric. Implement Workers of Am. v. Marshall, 584 F.2d 390, 396 n.26 (D.C. Cir. 1978). Upon a showing of good cause, a reviewing court may remand an action for further investigation. 19 U.S.C. § 2395(b) (1988).

Plaintiffs contend several of Labor's findings are not supported by substantial evidence in the administrative record. First, plaintiffs claim Labor's findings regarding the selection of vehicles based on their fully-equipped prices are not supported by substantial evidence because Labor does not define "fully-equipped" and the record does not contain the full-equipped prices of the models selected for analysis. Government counsel did not address this argument in her brief and conceded at oral argument the record does not contain a definition of "fully-equipped." The Court cannot determine whether Labor's findings are supported by substantial evidence in the absence of any indication by Labor as to what kind of options it would include under this criterion and whether the prices it used in comparing vehicles include those options.

Second, plaintiffs claim Labor's findings regarding sales of the Grand Am, Skylark and Calais are not supported by substantial evidence. According to plaintiffs, although Labor stated the two-door 2+2 criterion was a very important criterion, Labor's sales data for those models included both two-door and four-door sales, which exaggerated the size of the domestic market share. At oral argument, government counsel said Labor used the combined statistics because the sales statistics for two-door versions of those domestic models were not publicly available and Labor did not attempt to obtain them from the manufacturer. Government counsel claims that in any event Labor determined the error produced by including the four-door sales figures was *de minimis*. Defendant's Brief at 13 n.13.

There is no evidence in the record indicating Labor knew the extent to which its sales figures for three domestic models included four-door sales and that the error produced by inclusion of those sales was *de minimis*. *Post hoc* rationalizations of government counsel may not be relied upon to uphold agency action. *Burlington, Truck Lines, Inc. v. United States*, 317 U.S. 156, 168–69 (1962); *U.H.F.C. Co. v. United States*, 916 F.2d 689, 700 (Fed. Cir. 1990). Labor's findings regarding sales of the Grand Am, Skylark and Calais are not supported by substantial evidence.

Third, plaintiffs claim Labor's findings regarding its 2+2 criterion are not supported by substantial evidence because the record contains no data for rear seat legroom, headroom or width. For example, Labor excluded the Beretta, a domestic vehicle which had declining sales during the period of investigation, on the basis that it had a full rear seat. At oral argument, government counsel argued that findings under this criterion should be determined according to agency expertise, but stated the record does not contain any data regarding rear seat dimensions. The Court cannot determine whether Labor's findings are supported by substantial evidence in the absence of an indication by Labor as to how it measures rear seat room.

Next, plaintiffs claim Labor's determination lacks a reasoned analysis. First, plaintiffs claim that since the stripped base price of the Daytona is lower than $10,000, it was unreasonable for Labor to establish a base price criterion of $10,000 to $12,000. Government counsel responds that Labor considered that with the addition of an automatic transmission the price of the Daytona falls within the base price criterion, Defendant's Brief at 14; *see also* Conf. R. 48, but stated at oral argument that an automatic transmission was an extra for the Daytona. Government counsel also claims that Labor used the Daytona ES4, which had a base price of $10,834, when comparing 1989 base prices.

While Labor has great discretion in choosing its methodology, the record is unclear as to whether Labor used base prices which included extras when comparing vehicles under its stripped base price criterion. Also, the record does not support counsel's argument that Labor used the Daytona ES4 for comparison of base prices. On remand, Labor should explain whether it compares vehicles with extras and vehicles without extras when considering vehicles under its stripped base price criterion.

Second, plaintiffs claim Labor failed to reasonably explain its application of its base price criterion. For example, Labor included in the import segment four vehicles with base prices between $6,571 and $9,411 *over* the base price of the Daytona, but did not include comparably priced vehicles in the domestic segment. Also, plaintiffs claim Labor unreasonably excluded the Beretta from the domestic segment on the basis that its $10,535 (1988) and $11,000 (1989) base prices were lower than those of other models it selected. Plaintiffs argue Labor's failure to consistently apply its base price criterion is accentuated by the fact that Labor criticized plaintiffs' own proposed classification system for failing to consider price as an important differentiation factor.

Government counsel counters that Labor acknowledged several of the imports "bump up against the upper price limit," but were included in the segment because of their significant sporting characteristics, which Labor determined would be a major consideration for buyers contemplating the Daytona or LeBaron. Defendant's Brief at 15. Government counsel continues that the Daytona or LeBaron is purchased by a "buyer with discretionary income to spend on a vehicle that would function as much of a personal statement as a mode of transportation." Defendant's Brief at 15 n.15. Counsel does not address plaintiffs' argument regarding the Beretta.

The record does not support government counsel's arguments that Labor considered the significant sporting characteristics criterion to be more important than the price criterion or that prospective Daytona or LeBaron buyers seek to make personal statements. As noted above, *post hoc* rationalizations of government counsel may not be relied upon to uphold agency action. *See Burlington Truck Lines*, 371 U.S. at 168–69. Labor has failed to provide a reasoned explanation as to its selection of

vehicles under its base price criterion, including its exclusion of the Beretta.

Finally, plaintiffs claim that Labor improperly excluded the Beretta from the domestic segment on the basis that it lacked significant sporting characteristics since the Beretta's styling, suspension and engine selections place it in the segment. Government counsel responds that since the Beretta was not available in a 2+2, Labor rejected the Beretta because it did not meet the "critical requirement" of significant sporting characteristics and that Labor also found the Beretta was not available with a high performance engine option.

The record does not indicate, however, that the significant sporting characteristics criterion is the "critical requirement." Also, Labor did not explain why a buyer looking for a car such as the Daytona or LeBaron would only purchase a car with a high performance engine and why body shape and style do not meet the significant sporting characteristics criterion. Labor did not establish engine options as a separate criterion for the segment. In addition, Labor did not explain whether the Beretta possessed other sporting characteristics which may be significant, such as a particular suspension system or body shape and style.

CONCLUSION

For the above stated reasons, this action is remanded to the Department of Labor.

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSES
C91/257 9/24/91 Aquilino, J.	Accutime Watch Corp.	87–2–00185	716.09–716 716.05 Various
C91/258 9/24/91 Aquilino, J.	Americana Creations	84–12–01794	716.09–716 716.05 Various
C91/259 9/24/91 Aquilino, J.	Belfont Sales Corp.	85–8–01117	716.09–716 716.05 Various
C91/260 9/24/91 Aquilino, J.	Belfont Sales Corp.	85–10–01530	716.09–716 716.05 Various
C91/261 9/24/91 Aquilino, J.	Branded Time Corp.	88–4–00306	716.09–716 716.05 Various

FICATION DECISIONS

SSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
16.45, or s rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
16.45, or s rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
16.45, or s rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
16.45, or s rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
16.45, or s rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED
C91/262 9/24/91 Aquilino, J.	Delta Impex Watch Corp.	85–1–00058	716.09–716.45, 716.05 Various rates
C91/263 9/24/91 Aquilino, J.	Delta Impex Watch Corp.	85–4–00573	716.09–716.45, 716.05 Various rates
C91/264 9/24/91 Aquilino, J.	Delta Impex Watch Corp.	85–10–01527	716.09–716.45, 716.05 Various rates
C91/265 9/24/91 Aquilino, J.	Dynamic Supply, Inc.	85–8–01013	716.09–716.45, 716.05 Various rates
C91/266 9/24/91 Aquilino, J.	Eastman Watch Co.	88–7–00532	716.09–716.45, 716.05 Various rates

DECISIONS — Continued

	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
, or s	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
, or s	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
, or s	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
, or s	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
, or s	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

C91/267 9/24/91 Aquilino, J.	Grundig Electric Co.	85–8–01120	716.09–716.45, o 716.05 Various rates
C91/268 9/24/91 Aquilino, J.	Grundig Electric Co.	87–1–00052	716.09–716.45, o 716.05 Various rates
C91/269 9/24/91 Aquilino, J.	Omni Quartz, Ltd.	87–10–01042	716.09–716.45, o 716.05 Various rates
C91/270 9/24/91 Aquilino, J.	Time Electronics Corp.	84–11–01567	716.09–716.45, o 716.05 Various rates
C91/271 9/24/91 Aquilino, J.	World Forum Watch, Ltd.	84–3–00424	716.09–716.45, o 716.05 Various rates
C91/272 9/25/91 Musgrave, J.	Volume Shoe Corp.	90–2–00054	6402.99.30604 37.5%
C91/273 9/26/91 Aquilino, J.	Eastman Watch, Co.	85–8–01071	716.09–716.45, o 716.05 Various rates

or	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
or	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
or	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
or	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
or	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
	6402.99.15603 6%	Agreed statement of facts	Los Angeles Footwear
or	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

ABSTRACTED CLASSIFICATION D

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED
C91/274 9/26/91 Aquilino, J.	E. Gluck Corp.	84–1–00136	716.09–716.45, o 716.05 Various rates
C91/275 9/26/91 Aquilino, J.	E. Gluck Corp.	85–8–01022	716.09–716.45, o 716.05 Various rates
C91/276 9/26/91 Aquilino, J.	E. Gluck Corp.	85–11–01601	716.09–716.45, o 716.05 Various rates
C91/277 9/26/91 Aquilino, J.	E. Gluck Corp.	87–6–00743	716.09–716.45, o 716.05 Various rates
C91/278 9/26/91 Aquilino, J.	F & K Watch Co.	85–9–01156	716.09–716.45, o 716.05 Various rates

DECISIONS — Continued

	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
or	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
or	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
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or	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
or	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

C91/279 9/26/91 Aquilino, J.	World Forum Watch, Ltd.	85–8–01012	716.09–716.45, or 716.05 Various rates

or	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

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